IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 348

EDNA ALBRIGHT, WIDOW OF CLAYTON L. ALBRIGHT, DECEASED,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,

Respondent.

PETITION OF EDNA ALBRIGHT FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

PAUL BERMAN,
FISHER & FISHER,
HAMILTON O'DUNNE,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT ENTERED JUNE 14, 1944, BY THE COURT OF APPEALS OF MARYLAND, AFFIRMING THE ORDER OF THE BALTIMORE CITY COURT, REVERSING THE DECISION OF THE STATE INDUSTRIAL ACCIDENT COMMISSION OF MARYLAND AND RENDERING A JUDGMENT NON OBSTANTE VEREDICTO IN FAVOR OF THE RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable Chief Justice and Associates of the Supreme Court of the United States:

Your Petitioner, Edna Albright, prays that a Writ of Certiorari issue to review the judgment entered June 14, 1944 in the Court of Appeals of Maryland (R. Appendix 1) in the above entitled cause.

OPINION BELOW.

There was no opinion in this case by either the Maryland State Industrial Accident Commission or by the Court of Common Pleas of Baltimore City. The opinion of the Court of Appeals of Maryland was rendered on June 14, 1944 and has now been reported only in the Atlantic Reporter Advance Sheets, published July 22, 1944, 37 A. 2d 870.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the judgment of June 14, 1944, by the Court of Appeals of Maryland is invoked under Sec. 237 (b) of the Judicial Code as amended (28 U. S. C. A. 344 (b)). See also Rule 38 of this Court, adopted February 13, 1939, as amended.

STATUTES INVOLVED.

The Federal Statute involved is 45 U. S. C. A. 51, and particularly the second paragraph thereof, which is an amendment enacted in 1939. The entire Act reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for

such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The State Statute involved is Article 101 of the Maryland Code, 1939, which is the Maryland Workmen's Compensation Act, but the only two sections deemed applicable are Section 44 and Section 79. The applicable portion of Section 44 is as follows:

"The provisions of this Article shall apply to employers and employees engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen only in this State may, with the approval of the Commission, and so far as not forbidden by any Act of Congress, voluntarily accept the provisions of this Article by filing written acceptance with the Commission, which shall subject the acceptors to the provisions of this Article to all intents and purposes as if they had been originally included in its terms."

That part of Section 79 which is regarded as relevant provides that "in any proceeding for the enforcement of a

claim under this Article, it shall be presumed in the absence of substantial evidence to the contrary: (A) that the claim comes within the provisions of this Article."

STATEMENT OF THE CASE.

The Pennsylvania Railroad, on the 24th day of January, 1943, and for some time prior thereto, maintained a produce terminal at the general location of North and Mount Royal Avenues, in the City of Baltimore. This yard comprises "about ten delivery tracks and about five running tracks" (R. 14). To the side of the tracks is a long two-story shed, the second story of which is used for offices; the first floor (which is closed at night by drop doors), consists of platforms, where sample goods are displayed (R. 12). This terminal is maintained chiefly for Baltimore brokers who deal, generally, in perishable goods, (such as fruits and vegetables) which are shipped from points out of this State and delivered to them at this terminal. Some of the brokers rent platforms in this shed. Upon delivery of a car of produce the seal is broken, samples taken from the car and displayed on these platforms. These brokers sell the goods shipped to them at the terminal and when sold the purchaser unloads the car (R. 14). Other brokers do not rent platforms but break the seal and exhibit the products in the car direct to prospective purchasers, and when they sell, these cars too are unloaded by the purchasers (R. 22-23). The terminal is open "from midnight until 3 P. M. the next day." No cars are unloaded on Sundays, except as hereinafter noted (R. 24). Most of the freight received at the terminal is sold in Baltimore. If, however, the Baltimore market is inactive, some of this freight is reconsigned to points outside of Maryland. Most of the shipments received at this terminal, however, are sold in Baltimore and but a small portion of the freight is reconsigned (R. 14, 24-25). The

freight destined for the terminal is received at the Mount Vernon Yards, on the main line of the railroad; the cars are put on a siding, and from there delivered by switch engines to the terminal. As soon as cars arrive at the terminal, consignees are notified, either person to person or by telephone (R. 14). They are given forty-eight hours after seven A. M. of the day of their notification by the railroad of the arrival of a shipment within which to move the freight from the car (R. 23). On the night of January 23, 1943, there were one hundred and eight cars (loaded and empty) on the tracks at the produce terminal (R. 18). Most of the goods shipped in these cars were for delivery in Baltimore (R. 19). On the night of January 24, 1943, Clayton L. Albright sustained an injury at this produce terminal, of which he died on the 4th of February, 1943. He was employed by the railroad as a special policeman and commissioned by the Governor of Maryland as a special policeman for the State of Maryland (R. 38), and assigned for duty at this terminal to patrol the yard in general and prevent thefts (R. 12). His hours were from 4 P. M. until 12 Midnight (R. 11). He was required to examine cars in the yard and those arriving while on duty, to determine whether seals on these cars were broken. If he found a seal broken, he would apply another seal to the car, in order to safeguard the lading, it being his duty to see that no theft was committed from the cars (R. 12), as well as to keep unauthorized persons out of the premises. He had nothing to do with shifting, loading or moving any of the cars. His only duties were to patrol the yard and guard the premises (R. 13).

Edna Albright, widow of the deceased, filed a claim for compensation before the State Industrial Accident Commission, and, after a hearing, at which the issue was raised of whether the deceased was engaged in interstate commerce, the Commission awarded her compensation (R.

8-9). From this finding of the Commission, the Railroad Company appealed to the Court of Common Pleas of Baltimore City (R. 9-10). The case was tried, submitted to the jury, on the same issue, and the jury, by its verdict, sustained the Commission. Thereafter, the railroad filed a motion for a judgment non obstante veredicto, which motion was granted, thereby reversing the decision of the State Industrial Accident Commission of Maryland and from a judgment made absolute in favor of the employer and self-insurer (R. 42-43), the claimant appealed to the Court of Appeals of the State of Maryland.

This judgment was sustained by the Maryland Court of Appeals which held that the deceased was engaged at the time of the accident in duties in furtherance of interstate commerce and that, therefore, his widow's remedy, if any, would be governed by the provisions of the Federal Employers' Liability Act[1] exclusively and that there could be no recovery under the State Workmen's Compensation Statute.

CASES SUSTAINING JURISDICTION.

The cases believed to sustain the jurisdiction of this Court are:

Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943);
Davis v. Department of Labor, 317 U. S. 249, 87 L. Ed. 175, 63 S. Ct. 225 (1942).

QUESTIONS PRESENTED.

A. Where an individual is employed by a railroad company as a watchman of a terminal located wholly within the territory of a single state for the purpose of guarding the contents of the terminal against theft, and while engaged in his duties as watchman is killed without negli-

[1] 45 U. S. C. A. 51.

gence on the part of his employer, is his widow precluded from being granted an award by the State Industrial Accident Commission which does not make the employer's negligence a prerequisite to an award, or must her sole grounds of relief be the Federal Employers' Liability Act which requires negligence on the part of the employer before any damages can be awarded?

REASONS FOR GRANTING THE WRIT.

The opinion of the Court of Appeals is based on its particular interpretation of the effect of the 1939 amendment to the Federal Employers' Act, which is construed as including work of a character as theretofore was regarded as not being within scope of that Statute.

This Court has never ruled on the proper scope and effect of the 1939 amendment to the Federal Employers' Liability Act and both State and Federal authorities are in conflict with respect to its purpose and proper scope and effect. The Maryland Court of Appeals regards the amendment as no longer requiring that the employment affect interstate *transportation* (R. appendix, p. 4), although this has been the test adopted by this Court, *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 S. Ct. 517 (1916); *N. Y. Central R. R. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917); *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 76 L. Ed. 173, 52 S. Ct. 59 (1931), and states that the nature of the work being done at the time of the injury is the decisive factor in spite of a completely contrary Congressional intent, as expressed in the Senate Report on the amendment.[2]

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[2] Senate Report 661, 67th Cong. 1st Sess. 1939, states that it is the purpose of the amendment to include "employees of carriers who, *while ordinarily* engaged in the transportation of interstate commerce, may be, at the time of injury, *temporarily* divorced therefrom and engaged in intrastate operations." (Italics ours.)

The conflicting interpretations of the amendment have led to the adoption of different tests in different states. The case of *Louisville & N. R. Co. v. Potts, et al.*, 178 Tenn. 425, 158 S. W. 2d 729 (1941), adopts as the true test the general duties of the employee regardless of his activities at the time of injury. *Moser v. Union Pac. R. Co.*, 147 Pac. (2d) 336 (1944), holds that the nature of the duties at the time of injury is controlling, but recognizes a distinction between *transportation* and commerce, and *Ermin v. Pennsylvania R. Co.*, 36 Fed. Supp. 936 (1941), although recognizing that the character of the employment at the moment of injury is not controlling, indicates that the act was designed to cover intrastate employment in any way affecting interstate commerce.

A review of this case would furnish a definite standard by which the proper extent of this amendment could be determined in future cases.

The Court of Appeals of Maryland in deciding that the deceased was engaged in interstate commerce reached a conclusion in conflict with Federal cases in which similar facts were involved,

Delaware, L. & W. R. Co. v. Scales, 18 F. (2d) 73 (1927);

Feaster v. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

and ruled contrary to decisions reached in other states on closely corresponding facts.

Southern R. R. Co. v. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Grand Trunk Western R. R. v. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. v. Industrial Commission, et al., 290 Ill. 599, 125 N. E. 378 (1919); *Chicago, Rock Island & Pacific R. R. Co. v. Industrial Board*, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

The Maryland Court of Appeals in holding that the remedy of an employee of this character is exclusively within the Federal Act, has reached a conclusion contrary to the recent indication of this Court, as expressed in *Davis v. Department of Labor, supra*, to the effect that although a general class of employees may be protected by a Federal Act, there are nevertheless employees within that class who occupy a shadowy area "within which, at some undefined and undefinable point state laws can validly provide compensation."

The general hazards with which watchmen, who usually work alone, are confronted, are such that resulting injuries therefrom can usually not be attributed to the negligence of the Railroad employer and thus if their sole recovery is to be under the Federal Act, they would be, in most cases of injury, left virtually without any remedy.

For these reasons, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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HAMILTON O'DUNNE,
Counsel for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF THE PETITION.

FACTS.

Petitioner relies upon the facts as set out in the petition.

ARGUMENT.

I.

The Maryland Court of Appeals was in error in holding that the deceased was engaged in interstate commerce within the Federal Employers' Liability Act.

II.

The remedy for this class of employees should not be exclusively under the Federal Act.

These propositions will be considered in order.

I.

The Maryland Court of Appeals was in error in holding that the deceased was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act.

The Maryland Court of Appeals, in deciding the case at bar, construed the 1939 amendment to the Federal Employers' Liability Act as evidencing a Congressional intent to broaden considerably the Federal Employers' Liability law (R. Appendix, p. 4). It indicated that by virtue of the amendment the Act is extended to all employees of railroads who, *regardless of their normal duties*, are engaged at the time of the injury in work which in any way directly or closely and substantially affects commerce. It is submitted that Congress in the enactment of this amendment, did not attempt to extend it to *any class of employees not theretofore ordinarily covered*, but intended merely to circumvent the effect of the judicial limitation of the original Act to employees only if engaged in interstate commerce *at the time of injury*. This circumspective interpretation was announced by the Supreme Court in the case of *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 S. Ct. 188 (1915), and when the amendment was passed the Courts had been regarding the activities of an employee *at the time of injury* as conclusive, even though his regular duties were intimately connected with interstate transportation, and if, *at the time of the injury*, he was performing some function not so connected, he was held not to be entitled to the benefits of the Act. 38 *Mich. Law Rev.*, 754, 755. That it was the purpose of this amendment to avoid the necessity of determining the precise character of the employee's work at the instant of the injury and to protect all employees whose *general duties* clearly affected interstate transportation, but who tempo-

rarily and at the moment of injury were engaged in intrastate work, is aptly illustrated in the Report of the Senate Judiciary Committee on this amendment, which states that it

> ". . . is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, *while ordinarily engaged in the transportation of interstate commerce*, may be at the time of injury temporarily divorced therefrom and engaged in intrastate operations.
>
> ". . . as to those *who are constantly shifting from one class of service to another*, the adoption of the amendment will provide uniform treatment in the event that injury or death so occurs." (Sen. Rep. No. 661, 76th Cong. 1st Sess. 1939.)[1] (Italics ours.)

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[1] The complete report is as follows:

SENATE REPORT 661, 76TH CONGRESS, 1ST SESSION ON AMENDMENT TO FEDERAL EMPLOYERS' LIABILITY ACT, 45 U. S. C. 51.

"This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (*Shanks v. D., L. & W. R. R.*, 239 U. S. 556).

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the

In other words, it was the Congressional intent to "limit the scope of the amendment to employees who are *primarily engaged* in interstate commerce, although they may be 'at the time of injury *temporarily divorced* therefrom and engaged in intrastate operations'." (Italics ours.)

55 *Harvard Law Rev.*, 1212, 1213.

However, there is no indication that the Act was designed to cover employment of such a character as was formerly not regarded as "interstate commerce," as that expression as used in the Federal Act had been interpreted.

Clearly, Congress was without power to extend the Act to include employment of such a nature, as prior to the enactment of the amendment was not "interstate commerce", *First Employers' Liability case*, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141 (1908),[2] and an examination of the Act as it existed prior to the enactment of the 1939 amendment illustrates that it was broad enough to include employment which *was in fact* interstate commerce. Thus, the conclusion must follow that the sole purpose of the enactment of this amendment was to extend benefits to those persons who although normally engaged in interstate com-

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injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

[2] See also the Second Employers' Liability Cases, *Mondou v. N. Y., N. H. and H. Ry. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (1912).

merce *at the time of their injury* were involved in a wholly intrastate transaction.

Consequently, the Maryland Court of Appeals' interpretation of the amendment to include a type of employment hitherto excluded attributes to Congress an intent to extend its control to a class of employees whose activities this Court has held not to constitute interstate commerce as used in the Federal Act.

Heretofore, this Court in determining whether an employee was covered by the Federal Act has stated that the determining factor is a connection to interstate "transportation," as distinguished from "commerce."[3] In accordance with this "transportation" standard, this Court has held that the Act does not cover employees engaged in placing coal in coal chutes, after which it was supplied to locomotives engaged in interstate commerce. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 S. Ct. 517 (1916). Similarly, it has regarded an employee engaged in wheeling coal to heat a shop in which employees were repairing cars that had been and were to be used in interstate commerce, *Ill. Central R. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 S. Ct. 446 (1915); an employee guarding tools to be used in the construction of a new depot and tracks which would be used in interstate commerce, *New York Central R. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917), and an employee who fired a stationary engine which generated steam to heat a passenger depot and other rooms used for general railroad purposes, *Chicago, N. W. R. Co. v. Bolle*,

[3] It was stated in the case of *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 S. Ct. 188 (1915), that Congress in adopting the Federal Act used the term "interstate commerce," not in a technical sense but in a practical one better suited to the occasion, (see *Swift & Co. v. U. S.*, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 S. Ct. 276) and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?*

284 U. S. 74, 76 L. Ed. 173, 52 S. Ct. 59 (1931), as not being so connected with interstate *transportation* as to be covered by the provisions of the Federal Act. The explanation is well epitomized in the *Bolle* case, *supra*, p. 80, where it was stated that what the employee produced was not use in the *transportation* of anything. The Maryland Court of Appeals, by the language of its opinion which states that *before* the passage of the Act "the employee of the carrier was required to be engaged in duties involving actual transportation," (R. Appendx. p. 4), clearly indicates that it interprets the amendment as discarding "transportation" as the test, in spite of the decisions of this Court and in spite of the fact that the history of the amendment indicates no such Congressional intention.

In accordance with this Court's adoption of the general rule requiring interstate transportation to bring an employee within the terms of the Federal Act, yard watchmen employed by interstate railroad companies have been held as not employed in interstate commerce within that Act. It was held in *Delaware, L. & W. R. Co. v. Scales*, 18 F. (2d) 73 (1927), that a railroad policeman was not subject to the Federal Employers' Liability Act. The Court declared:

> "We take notice of the fact that what are called *railway policemen are creatures of state law.* There is nothing in federal statutes creating them, or giving them authority, allying them officially to interstate commerce. *Their police function is to arrest, pursuant to state law*, offenders against any lawful authority, state or national. But evidently *they have nothing to do with transportation of any kind.* A guard upon a car traveling between states would be in a different position." (Italics ours.)

In the case at bar, the deceased was employed as a special policeman and assigned to duty at the Pennsylvania

Railroad Produce Terminal (R. 11), and in addition was commissioned as a special policeman for the State of Maryland by the Governor of that State (R. 38). Thus, as stated in the *Scales* case, *supra*, he *was* a creature of state law whose function was to guard against and arrest for violations of state law. Certainly, he had nothing to do with transportation. When his duties are compared with those of the employee in the *Harrington* case, *supra*, it is apparent they have even less relation to interstate transportation than did the duties of the employee in that case. Federal and State authorities are in harmony with the *Scales* case and have held that yard watchmen were not within the Federal Act.

Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Feaster v. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

Califore v. Chicago, St. P., M. & O. Rlwy. Co., 220 Iowa 676, 263 N. W. 29 (1935);

Southern Railway Co. v. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Grand Trunk Western Rlwy. v. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. v. Industrial Commission, 290 Ill. 599, 125 N. E. 378 (1919);

Hardy v. Atlanta & West Point R. R. Co., 20 Ga. App. 363, 93 S. E. 18 (1917);

Chicago, Rock Island & Pacific Railway v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

From the nature of the duties of the deceased, it is manifest that nothing he did in the performance thereof affected or contributed to interstate transportation. If, as held in the *Harrington* case, *supra*, the placing of coal in

chutes from which it was fed to engines engaged in interstate commerce, is not employment of such a nature as to come within the Federal Act, then clearly the mere guarding of cars in a terminal, as incident to guarding all the property within that terminal, has no such definite relationship to interstate transportation as to bring such employment within the terms of that legislation.

In the case of *Thomson v. Industrial Commission, supra*, decided by the Supreme Court of Illinois in 1943 and in which the 1939 amendment was considered, the watchman injured while patroling the railroad property had duties which were almost identical to those of the deceased in the case at bar,[4] except that in addition to his duties of examining and testing seals on cars and guarding their contents *he was also required to inspect passing trains, both interstate and intrastate*, for hot boxes and other defects and *observe the tracks for broken rails and obstructions.* The Court, in upholding his right to recover under the State Compensation Act, declared that he "was employed to patrol and protect his employer's property. The fact that he was employed by an interstate carrier does not change the local nature of his employment, or subject all of his activities to congressional regulation."

> "At the time of the injury, Stoll was engaged in the prevention of a violation of the laws of Illinois—a

[4] Stoll, the deceased, had entered the employ of the Railway Company in 1933, as a patrolman and worked in that capacity until the date of the injuries for which he claimed and was awarded compensation under the State law. The opinion states at p. 387: "As patrolman, it was his duty to patrol the railroad right of way in his district, look out for fires, eject or arrest trespassers, examine and test seals on cars (both interstate and intrastate) and protect the cars and their contents from thieves and trespassers. It was also his duty to inspect passing trains (both interstate and intrastate) for hot boxes and other defects, and observe the tracks for broken rails and obstructions. His duties were primarily those of a policeman. He worked under the direction of the captain of the railroad police." While attempting to arrest a trespasser, two other men attacked him and pushed him off a twenty foot high viaduct causing the injuriees for which he sought compensation.

simple trespass on the right of way. The fact that interstate commerce might be moved over the tracks of that right of way, did not lend an interstate aspect to his acts or place him in interstate commerce."

The award made by the Maryland State Accident Commission was in effect a finding of fact that the deceased was not engaged in interstate commerce. It was stated in *Lawrence v. Rutland Railroad Company*, 112 Vt. 523, 28 A. 2d 488, Cert. Den. 317 U. S. 683, that the finding of the State Industrial Accident Commission that an injured employee was not engaged in interstate commerce is a finding of fact and that the award must stand if the facts fairly and reasonably tended to support it.

In the case at bar the record shows clearly that the deceased had nothing to do with the loading, moving or shifting of the cars, but had only the duty of patroling the premises (R. 13). Clearly, these facts coupled with the fact that he was employed as a special policeman (a class of employees who have been held as not engaged in interstate commerce within the Federal Act) *reasonably* support the finding of the Commission.

II.

The remedy for this class of employees should not be exclusively under the Federal Act.

It is true that this Court in the case of *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 S. Ct. 546 (1917), decided that if an employee was entitled to bring an action under the Federal Act, his remedy thereunder was exclusive. In that case, however, the duties of the employee were closely and substantially connected with interstate commerce and there was no question that he was so engaged therein, he being employed as a laborer

in the repair of the railroad's main track.[5] This Court, however, has recognized that in certain cases there is no well defined line for determining the character of a man's employment and very recently it has declared in the case of *Davis v. The Department of Labor and Industries of the State of Washington*, 317 U. S. 249, 87 L. Ed. 175, 63 S. Ct. 225 (1942), that there is "clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements."

This opinion has been interpreted as signifying that persons in this twilight zone may have remedies under either a State Act or a Federal Act. (See the dissent of the Chief Justice, 317 U. S. at p. 260.)

In determining the rights of those persons in this twilight zone, the Court held that it "must give great—indeed, presumptive—weight" to the state statutes involved. Thus, in the *Davis* case, *supra*, in making this factual judgment, the Court relied heavily on the presumption of constitutionality in favor of the state statute. Furthermore, the Maryland State Workmen's Compensation Act provides that in the absence of substantial evidence to the contrary,

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[5] Mr. Justice BRANDEIS in a vigorous dissent concurred in by Mr. Justice CLARK, urged that the states should not be denied a right to have their own local laws applied to railroad employees. He stated that

> "The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents according to whether they reside in one or the other of our States and Territories so widely extended. In a large majority of instances, they reside in the State in which the accident occurs. Though the principal that compensation should be made, or relief given is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare."

it shall be presumed that a claim comes within the State Act.[6] A similar provision is contained in the New York Workmen's Compensation Act which this Court has declared constitutional. *New York Central R. R. Co. v. White, supra.*

It was clearly the intention of Congress in enacting the Act in question to confer *benefits* on railroad employees and not to impose any burdens upon them.[7] Consequently, even though it be assumed that the Maryland Court of Appeals was correct in its view that the 1939 amendment brought within the Act employees whose general duties were such that prior to its passage they would not have been included, the wording of the amendment illustrates that it was the primary intention to confer *benefits* and not to deprive employees of a recovery which they formerly would have enjoyed and thus in harmony therewith, they should not become virtually devoid of a remedy. Chief Justice Moffatt of the Supreme Court of Utah in 1939 urged that employees who are unable to prove that their injuries resulted from the negligence of the employer be allowed to recover under a State Compensation law.[8]

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[6] Art. 101, Sec. 79, Maryland Annotated Code (1939).

[7] President Roosevelt in urging the enactment of the First Federal Employers' Liability Act, declared:

> "The practice of putting the entire burden of loss of life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. . . . I urge upon Congress the enactment of a law which will at the same time bring federal legislation up to the standard already established by all the European countries, and which will serve as a stimulus to the various states to perfect their legislation in this regard."

See 42 *Cong. Rec.* 73 (1907).

[8] See the dissent of the Chief Justice in the case of *Harrington, et al., v. The Industrial Commission*, 96 Utah 544, 558-559, where he states:

> "Before the Federal Employers' Liability Act is applicable to one engaged in an employment two elements must concur: (1) That the employee must be engaged in interstate commerce. (2) That the employer was negligent. So if the employer was not negligent and the injury arose out of or in the course of the employment why should the courts or national Congress say or attempt to say that the state might not be permitted to allow the injured or his dependents something to relieve his or their suffering, loss of earning

The view is adopted in 55 *Harvard Law Review*, 1212 1213, that if the Act is extended by the amendment and the remedy held exclusive, then a hardship is worked on employees who would have recovered prior thereto under State Workmen's Compensation Acts which, as opposed to the Federal Act, generally require no proof of negligence on the part of the employer.

This is especially true in cases involving injuries to watchmen at terminals, the very nature of whose duties involve hazards which result in injuries in no way traceable to the negligence of the employer. The watchman is in fact employed for the specific purpose of preventing results to others for which the railroad company would be held negligent in not avoiding. The character of his duties differs materially from that of the ordinary employee *within the act* whose duties are intimately connected with the movement of traffic and who in the exercise of due care will ordinarily not sustain injury except in those cases where the employer *is* guilty of negligence. Thus, except for the most unexpected and unusual case, it is difficult to imagine that injuries sustained by a watchman *in the course of his duties* would ever be traceable to his employer's negligence and yet it is apparent, when the

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capacity or resultant dependent condition under a state law or to provide for the support or maintenance of its injured or incapacitated citizens?

"The burden of caring for dependents, the crippled, maimed, or incompetents rendered so because of industrial accidents and injuries is essentially a state burden. That the Congress of the United States could provide for the care of those whose incapacities arise out of activities in interstate commerce may be granted. At the present time, it has not been done. When, however, we get one step farther removed and have to deal with injuries for which the employer is not responsible as in cases like the present one (interstate commerce but no negligence) and the responsibility rests upon a third party who is or may be unable or unwilling to respond the irony of the situation becomes intense. Under the exclusive construction given the Federal Employers' Liability Act the protection provided by the employer and the state is denied the injured employee and his dependents. Thus a protective measure becomes a weapon barring the relief that should be given."

ordinary risks of the employment are considered, that injuries will be *frequent*. Therefore, to hold that a watchman's recovery is dependent on his ability to prove negligence would be most prejudicial to this class of employees, and for the most part would leave them with no remedy for injuries sustained and would leave watchmen as a class in that same deplorable position of having the entire burden of loss of life or limb placed upon the victim or the victim's family, which was regarded as such a form of social injustice as to promote the passage of the Employers' Liability Act in an endeavor to eliminate such an undesirable situation.

In conclusion, it is urged that because Section 79 of the Maryland Workmen's Compensation Act provides that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the State Act, and because this Court in the *Davis* case, *supra*, stated that great and indeed presumptive weight is to be given to State Statutes, the Petitioner should not be barred from recovering under the State Workmen's Compensation Act.

It is, therefore, respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

PAUL BERMAN,
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HAMILTON O'DUNNE,
Counsel for Petitioner.

SEP 7 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 348

EDNA ALBRIGHT, WIDOW OF CLAYTON L. ALBRIGHT, DECEASED,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, A BODY CORPORATE, EMPLOYER AND SELF-INSURER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD E. HARGEST, JR.,
Attorney for Respondent.

The Daily Record Co. Print, Baltimore.

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FACTS.

Clayton L. Albright was employed by The Pennsylvania Railroad Company on November 17, 1942, as a Special Policeman and was assigned for duty at the Pennsylvania Railroad Produce Terminal at North Avenue and Mt. Royal Avenue, Baltimore, Maryland. His tour of duty was from 4 p. m. until midnight (R. 11). In the Produce Terminal

Yards there are fifteen or twenty tracks. There is also a long shed, on the second floor of which there are offices, and on the first floor are platforms where samples of produce are kept by merchants (R. 12).

His duties were to inspect cars in the yard, as well as cars coming into the yard to determine whether there were any seals broken, and to patrol the yard to see that no thefts occurred from the cars, which were still in the custody of the Railroad Company. There were many of the cars among the 108 then in the yard that the consignee had not yet accepted delivery of. Also to go to Mt. Vernon Yard, which is two blocks away, to examine the seals of any and all cars coming into and passing through Mt. Vernon Yard to determine if there were any seals on the cars, and if broken, to apply seals; and to patrol the yard in general, seeing that no theft was committed (R. 12-13).

William E. Albrecht is the Head Clerk at the Pennsylvania Railroad Produce Terminal, who is the Custodian of the records. The terminal is used for the delivery and reconsignment of perishable freight, mainly produce. There are, however, a few cars of merchandise loaded at the terminal. The cars that are not delivered to merchants at the terminal are reconsigned to other points outside of the state wherever there may be an advantageous market, and all of the cars coming into the terminal originate outside the State of Maryland. When a car arrives consigned to a merchant at the terminal, the railroad notifies the merchant, who in turn unloads the car (R. 14 and 15).

On Sunday, January 24, 1943, Clayton L. Albright reported for duty and sometime during the night he was injured while at work, which injury resulted in his death on February 4, 1943 (R. 4). At the time of his injury there were 108 cars, most of which were loaded interstate

ones, in the yard. As no business is transacted at the terminal on Sundays, no cars were unloaded that day, nor were any of the consignees notified of the arrival of cars that day.

There was not one iota of evidence produced by the Claimant to contradict or dispute the records offered in evidence, the testimony of Albrecht, the Head Clerk, or Lieutenant Swope.

ARGUMENT.

Employment in Interstate Commerce is where the Employee was actually engaged in Interstate Commerce, or where his duties are so closely related to it as to be practically a part of Interstate Commerce.

Under the facts in this case, which were uncontradicted, the lower court and the Court of Appeals of Maryland held that Special Policeman Albright at the time of his injury and accidental death was engaged in interstate transportation, or in work so closely connected with it as to be practically a part of it, which is also the test applied by the Supreme Court of the United States in the following case. *Shanks vs. D. L. & W. R. R.*, 239 U. S. 556.

Under the uncontradicted evidence in this case, Clayton L. Albright, deceased, was engaged in interstate commerce, and the proper action is governed by the Federal Employers Liability Act (45 U. S. C. A., Sec. 51, etc.).

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter".

In a report accompanying the bill amending the Federal Employers Liability Act, Senator Neely, from the Committee on Judiciary, explained the purpose of this amendment as follows:

> "This amendment is intended to broaden the scope of the Employer's Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or works so closely related to it as to be practically a part of it'. (Shanks v. D. L. & W. R. R., 239 U. S. 556).
>
> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.
>
> "As a result of the uncertainty which exists in border-line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed". Report #661, Calendar #712, Senate, 76th Congress, 1st session, June 22, 1939, printed to accompany S. 1708.

It would thus appear to have been the intent of Congress to extend the benefit of the Federal Act to any employee, any part of whose duties was in the furtherance of interstate commerce, in order to give railroad employees a sole and uniform remedy for injuries sustained during the course of their employment.

In Robert Federal Liabilities of Carriers, Vol. 2, Second Edition, p. 1535, Sec. 796, State Workmen's Compensation Laws supersede by federal act as to injuries arising in interstate commerce:

"The Federal Employers Liability Act proceeds upon the principle which regards negligence as the

basis of duty to make compensation and excludes the existence of such a duty in the absence of negligence; but Congress intended the statute to be as comprehensive in those instances in which it excludes liability as of those in which liability is imposed. It established a rule or regulation which is intended to operate uniformly in all the states as to all employees of common carriers by railroad working in interstate commerce, and, in that field, it is both paramount and exclusive. State Workmen's Compensation Laws which provide a compensation to employees without regard to the question of the employers default or neglect, have therefore no application to employees of common carriers by railroad killed or injured while engaged in interstate or foreign commerce, even in the absence of negligence; for, when Congress legislates concerning a subject matter of interstate commerce, all state laws covering the same field are necessary superseded by reason of the supremacy of the national authority. Under the commerce clause, Congress may regulate the liabilities of common carriers and the rights of their employees arising out of injuries sustained by the latter when both are engaged in interstate commerce. The national legislative body acted upon the subject in passing the Employers Liability Act, and hence, awards under state compensation laws to employees of common carriers by railroad killed or injured which engaged in interstate commerce, are void".

This is clearly set forth in the case of Agostino vs. The Pennsylvania Railroad Company, 50 Federal Supplement, p. 726, decided July 2, 1943. The court in this case held that in an action under the Federal Employers Liability Act it is desirable procedure for parties to submit the question whether the plaintiff was employed in interstate commerce with the Act to the court in absence of a jury so as to avoid confusion at the trial; and further, that the amendment of the Federal Employers Liability Act, giving

to an employee of a carrier any part of whose duties shall be in furtherance of interstate or foreign commerce or in any way directly or closely and substantially affects such commerce and benefits the Act relating to liability of common carriers by railroad to employees should be liberally construed so as to extend protection of the Act to all employees, any part of whose duties furthers or affects interstate commerce in any way.

It is contended that the Federal Act applies in this case, and therefore, the State Workmen's Compensation Act does not apply.

The Supreme Court of the United States in the case of Hattie Mae Tiller, Executrix of the Estate of John Lewis Tiller, deceased, vs. Atlantic Coast Line Railroad Company decided on February 1, 1943 (87 U. S. Law Ed. 446), held that a recovery under the Federal Employers Act could be had. Mr. Tiller was a policeman for the railroad company. Among his duties was that of inspecting seals on cars in railroad yards to make sure that no one tampered with them. The whole question raised in that case was whether or not Mr. Tiller had assumed the risk as referred to by the 1939 amendment to the Federal Employers Liability Act. The amendment provides that an employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier. There was never any question but that Mr. Tiller was entitled to the benefits of the Federal Employers Liability Act and not entitled to compensation under the State Compensation Act.

Even before the amendment of 1939, the courts consistently held that patrolmen and night watchmen were engaged in interstate commerce.

In the case of Dade vs. N. Y. Central Railroad Co., 206 N. Y. S. 519; Dade was killed by gunshot while working for the railroad as a night watchman, and in that case the court held that Dade was employed in interstate commerce.

In the case of Fitzgerald vs. Great Northern Rwy. Co., 196 N. W. 657; the court held that a night watchman in a yard used for indiscriminate service was engaged in interstate commerce.

In the case of A. T. & S. F. Ry. Co. vs. Ind. Acc. Comm. of Cal., 220 Pac. 342; the court held that a watchman in a yard during a strike found shot near an interstate train was engaged in interstate commerce and the Federal Act applied.

Also, O'Brien vs. Pennsylvania Railroad Company, decided by the Supreme Court, Appellate Division, 3rd Department of N. Y., May 7, 1919, and reported in 176 N. Y. S. 390, the following will be found. This was an appeal by the Pennsylvania Railroad Company from an award made by the State Industrial Accident Commission against them, a self-insurer, in favor of Ellen O'Brien, widow of Patrick O'Brien, and in reversing the award of the State Industrial Accident, P. J. Henry J. Kellogg gave the following opinion:

> "The deceased was employed by appellant as a watchman at Piers 27, 28 and 29, North River, New York. These piers were maintained by the appellant for the receipt and delivery of freight from cars ferried across the river upon floats from points in the State of New Jersey. In the rear of the piers, running the whole length thereof, was an open space on West Street commonly known as the "farm". Overflow produce arriving at the piers was placed upon the farm, there to wait removal by consignees. The deceased

was engaged in acting as watchman for a shipment of potatoes in barrels from the State of Florida, which had arrived at the pier and had been placed upon the farm, when he was run down by a motor truck and killed. The consignee was entitled to 47 hours notice before removing the consignment. Before this time had elapsed and before the consignee had taken possession of the shipment or paid the freight charges thereon the accident happened. Within the well settled principles of law transportation of the potatoes, which was interstate, had not ended when the accident occurred—McNeill vs. Sou. Ry., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Cleveland, Cincinnati & St. Louis vs. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 Law Ed. 453; Sou. Ry. vs. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 Law Ed. 836; Jennings vs. Clyde Steamship Co., 148 App. Div. 615, 133 N. Y. S. 298, Chalmers vs. New York Central, 175 App. Div. 239, 161 N. Y. S. 577. The case of Chicago, Burlington & Quincy Railroad vs. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 Law Ed. 941, is not in disagreement with the cases cited. In that case an employee was engaged in moving coal from the storage tracks of the consignee to the coal chutes of the consignee, the coal being in the possession of the consignee at all times during the work which was being performed by the employee at the time of his injury. The deceased in this case, having been engaged at the time of the accident in guarding an interstate shipment the transportation of which had not ceased, an award could not properly be made. The award is reversed and the claim dismissed. All concur".

In the case of Elder vs. The Pa. R. R. Co., 180 Atl. Reporter, p. 183 decided in 1935, the Superior Court of Pennsylvania held that a railroad policeman, whose general duties were to drive trespassers from the railroad tracks, over which were hauled both interstate and intrastate shipments, and to prevent thefts of merchandise on such ship-

ments, was engaged in interstate commerce regardless of the intrastate phase of the work, as duties were not separable, and hence action for accidental death of policeman while chasing trespassers from tracks was governed by Federal Employers Liability Act, and not by the State Compensation Act.

Respondent feels that this appeal is also controlled by the case of Thomas vs. The Pa. R. R. Co., 162 Md., 509 where the claimant's decedent was not as closely connected with interstate transportation. In the Thomas case a freight conductor working in local railroad yards shifting and selecting cars for future shipment out of the state (four days after accident occurred before train left) was held to be engaged in interstate commerce under a binding instruction given by the court to the jury. This court through Chief Judge Bond said:

> "The second execution, that upon which the question of the interstate or intrastate character of the work being done by the deceased arises, was to an instruction given to the jury that the work was in interstate commerce, and therefore compensation was not allowable under the state act. The general guiding principles for distinguishing between work of the one description and the other, within the meaning of the law, have been fully discussed in the recent case of Boyer vs. Pennsylvania Railroad Co., 162 Md. 328, 159 A. 909, at the January term of court, and repetition is unnecessary. The distinction, when both kinds of work are carried on by the same employees in the same yards, must frequently be narrow and difficult to draw. But, in the several decided cases in which the work being done at the time of injury has been substantially the same as that being done by Thomas at the moment, moving or going to move to the place of loading cars assigned for interstate transportation, there appears to be general agreement among courts of the country that the injury is to be classed as one

sustained in interstate commerce. Many somewhat similar cases may be found reviewed in the notes to the United States Code Annotated, title 45, pp. 148 to 153. In Moyer vs. Pennsylvania R. Co., 247 Pa. 210, 93 A. 282, this classification was given to an injury sustained in shifting a car to a yard where it would later be loaded with an interstate shipment. Another injury in shifting a car for interstate loading was so classified in Christy vs. Wabash R. Co., 195 Mo. App. 232, 191 S. W. 241. And in Jeneary vs. Chicago & Interurban Traction Co., 225 Ill. App. 122, affirmed in 306 Ill. 392, 138 N. E. 203, two empty cars were being shifted to a factory for an interstate loading, as in this case, and an injury which occurred then was likewise held to be one sustained in interstate commerce. The same conclusion on similar facts had been previously announced in Chicago Junction R. Co. vs. Industrial Board, 277 Ill. 512, 115 N. E. 647. And see Jarvis vs. Chic., B. & Q. R. Co. (1931), 327 Mo. 428, 37 S. W. (2nd) 602. And in the present case, even without the confirmation afforded by the decisions cited, we could not avoid the conclusion that a workman engaged in procuring and placing cars to receive and carry interstate shipments was engaged in interstate commerce as defined in the authorities. The entire task seems to have been only the first part of an interstate undertaking. We see no error in the ruling made the subject of the second exception".

In the case of O'Neill vs. Erie R. R., 169 N. Y. Supp. 1008, the court held where the train had been engaged in the movement of interstate freight the freight cars had been detached and placed on a side track. The caboose with the plaintiff therein was running along on a descending grade when an overtaking train collided with it, causing plaintiff's injuries. The court said at page 1009:

"The interstate transportation had not ended merely because the cars had come within the yard. The conductor had also to deliver the way-bills at defendant's

freight office, toward which he was going in the caboose, which was as much a part of the interstate transportation as was the movement over the state line".

Under the modern authorities, not only should the work that the employee was doing at the precise moment he was injured be considered in determining the question of interstate commerce but also the general nature and character of his work. Rader vs. B. & O. R. R., 108 Fed. 2d 980; Riley vs. Pa. R. R., 8 At. 2d. (Pa.) 448; Miller vs. Lehigh R. R., 9 At. 2d. (Pa.) 917; Elder vs. The Pa. R. R. Co., 180 Atl. 183, 118 Pa. Super. 137; Evans vs. U. S. R. R. Admr., 191 App. Div. (N. Y.) 704; Phila. & R. Ry. Co. vs. Polk, 256 U. S. 332; Roberts Federal Liabilities of Carriers, 2nd Ed., Vol. 2, Sec. 727, page 1372; Trowbridge vs. Kansas City R. R., 179 S. W. (Mo.) 777.

It was clearly the intention of Congress in amending the Federal Employers Liability Act to confer benefits on railroad employees which they had not heretofore enjoyed, and this has been accomplished by providing a sole and uniform cause of action under the Federal Employers Liability Act. The petitioner contends in his argument to this Honorable Court that in invoking the Federal Employers Liability Act in this case is to deprive railroad employees who are injured during the course of their employment an adequate remedy to recover for said injuries. This contention if upheld would be in effect to void the full force and effect of the meaning of the Federal Employers Liability Act as amended (1939). Nowhere does the petitioner dispute the conceded and agreed facts that at the time Special Policeman Albright was killed he was engaged in the inspection of the interstate cars at the Produce Terminal.

The petitioner states in his argument that the Court of Appeals of Maryland in deciding that the deceased was engaged in interstate commerce reached a conclusion in conflict with federal cases in which similar facts were involved, citing the following cases: Delaware L. & W. R. Co. vs. Scales, 18 Fed. 2d 73 (1927); Feeder vs. Sou. Rwy. Co. et al., 15 F. 2d 540 (1926). These cases it is respectfully submitted were decided in 1926 and 1927, respectively, before the Federal Employers Liability Act was amended in 1939, and since the amendment of the Federal Employers Liability Act was intended to broaden the scope of the Federal Employers Liability Act so as to include within its provisions any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall in any way directly or closely and substantially affect such commerce be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of the Federal Employers Liability Act. It would also be noted in the petitioner's argument in which they cite the following cases in support of their contention, that the Federal Employers Liability Act does not apply in the present case before this Honorable Court.

Thomson vs. Industrial Commission, 380 Ill. 386, 44 N. E. (2d) 19 (1942), Cert. Den. 318 U. S. 755;

Feaster vs. Southern R. R. Co., et al., 15 F. (2d) 540 (1926);

Califore vs. Chicago, St. P., M. & O. Rlwy. Co., 220 Iowa 676, 263 N. W. 29 (1935);

Southern Railway Co. vs. Varnell, 222 Ala. 237, 131 So. 803 (1930), Cert. Den. 283 U. S. 852;

Grand Trunk Western Rlwy. vs. Industrial Commission, 291 Ill. 167, 125 N. E. 748 (1920);

Chicago & Alton R. R. Co. vs. Industrial Commission, 290 Ill. 599, 125 N. E. 378 (1919);

Hardy vs. Atlanta & West Point R. R. Co., 20 Ga. App. 303, 93 S. E. 18 (1917);
Chicago, Rock Island & Pacific Railway vs. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916 F. 540 (1916).

All of which cases were decided before the amendment of the Federal Employers Liability Act (1939).

CONCLUSION.

In conclusion it is submitted that the petition for a Writ of Certiorari should be denied because (a) the unanimous opinion of the Court of Appeals of Maryland is in accord with the applicable decisions of this Court; (b) no clear or palpable error is set forth in the petition for Writ of Certiorari; (c) petitioner's brief does not comply with Rule 38 of this Honorable Court in that said brief is not direct and concise; (d) there is no special or important reason for the granting of a Writ of Certiorari in the present case because no new federal question is involved.

Respectfully submitted,

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